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Legal Dept.

A BRANCH

Opinions under the Code

Criminal Procedure Act 1898

P-64

E

File No. O. Cr. P. C. 148

Gen. 194 a.

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C O N T E N T S.

Legal Department

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SP 22/6

Office of the R.L.A.

Criminal Procedure Code,1898.

Order under sec.144, banning export of arms.

The order passed by District Magistrate, Surat under section 144, Criminal Procedure Code is without jurisdiction and ineffective (see R.L.A's opinion No.7682 dated 25.7.48). Consequently the question whether that order prohibits the taking by a person of his own arms with him does not arise.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

U.R. to H.D.No.313, dated the 19th January 1948.

EKN.12/6/

No.245.

Office of the R.L.A.
Bombay Castle, 9th January 1948.

To
The District Magistrate,
Bijapur.

Subject: Bijapur Criminal Case No.106 of 1947

With reference to your letter No.M.C.R. 7/47 dated the 5th December 1947, I am forwarding herewit my opinion in the matter.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

EKN.12/6/

Office of the R.L.A.

Section 562 of the Code of Criminal Procedure reads thus;

> "When any person not under twenty-one years of age is convicted of ~~an~~ an offence punishable etc. etc. and no previous conviction is proved against the offender e to."

The words "~~an~~ offence~~x~~" do not necessarily mean one offence. A person who is convicted at the same trial of more than one offence, forming part of the same transaction as in this case, can be separately admitted to the benefit of section 562 for each of such offences, it may be, by making separate orders to that effect; and his conviction for one of such offences cannot, for the purposes of section 562, be treated as a previous conviction. The remarks in 40 Bombay law Reporter p.227 Emperor v.Yeshaba Sakoba Patil must be confined to the facts of that case and cannot be construed to mean that the application of section 562 in the above manner was delcared illegal. The view taken by the Additional Stipendiary Magistrate appears to be substantially correct. However the proper course for the District Magistrate in this case would be to make a reference to the High Court which alone can settle the doubt with finality. ~~It is not otherwise proper to issue the doubt with finality.~~ It is not otherwise proper to issue instructions to Magistrates which appear to conflict with the remarks in 40 Bombay Law Reporter 927.

Sd/ P.M. Lad.

Remembrancer of Legal Affairs.

~~K~~KN.12/6/

Office of the R.L.A.

Extension of District Magistrate's Order under section 44(6) Cr.P.C.

Whether amendment by Government permissible.

Code of Criminal Procedure, 1898.

The view taken by H.D. is correct. Under sub-section (6) of section 144, Criminal Procedure Code, Government is vested with power to extend the order of the Magistrate passed under sub-section (1). Consequently Government can extend the order of the District Magistrate as worded by him and cannot modify his order and extent it.

Sd/ P.M. Lad.

Remembrancer of Legal Affairs.

U.R. to H.D. No.887 dated the 27th Jaunary 1948.

EKN.12/6/

Office of the R.L.A.

The draft sanction order under sub-section (1) o section 197 of the Criminal Procedure Code at p.13 an is in order.

2. In reppect of sanction under section 6(b) of the Prevention of Corruption Act, the original draft at p.15 ante did not purport to give sanction under that section for the offence under section 161 of the Indian Penal Code. That defect has been rectified. The original draft, however, showed that the accused was proposed to be prosecuted also for themf offence of criminal misconduct, i.e., under sub-section (2) read with clause (a) of sub-section (1) of section 5 of the Prevention of Corruption Act, 1947 Sub-section (1) enacts that a public servant commits criminal misconduct if he habitually accepts or obtains any illegal gratification. The facts do not disclose any evidence showing that the accused was in the habit of receiving illegal gratifications as a motive or reward, such as is mentioned in section 161 of the Indian Penal Code. In my opinion a single instance of receiving illegal gratification on a particular day or occasion cannot mean habitual acceptance within the meaningof section 5(1), clause (a). Besides, the Prevention of Corruption Act, 1947 came into operation by the middle of April 1947. Section 5 of that Act, whereby criminal misconduct in the discharge of official duties has been made special offence, would not normally have retrospective effect. Even in a case, where one of the ingredients of an offence had been committed before the Act came into operationl the fact that the other ingredients were committed subsequently, do not make the offence one within the Act (Maxwell. Interpretation of

Statutes, 8th Edition, p.191). In this case, the evidence, on record shows that the offence was committed in December 1946 and it would, therefore, be difficult to sustain a prosecution under section 5(2) of the prevention of Corruption Act. For these reasons, all reference to section 5(1) clause (a) has been deleted from the sanction Order under section 6(b).

Sd/ R.M.Lad.

Remembrancer of Legal Affairs.

U.R. to R.D.No.60 Confl dated the 3rd February 1948.

EKK.12/6/

Office of the R.L.A.

STATEMENT OF THE CASE.

Section 2 of the Bombay Essential Supplies (Temporary Powers) and Essential Commodities and Cattle (Control) (Enhancement of Penalties)Act, 1947, provides an enhanced penalty which may extend to seven years imprisonment for offences of contravention of orders made or deemed to be made under section 3 of the Essential Supplies (Temporary Powers) Act, 1946, and section 4 of the Bombay Essential Commodities and cattle (Control) Act, 1946, Section 3 of the same Act provides further that, notwithstanding anything contained in section 32 of the Code of Criminal Procedure, 1898, it shall be lawful for any magistrate of the first class specially empowered by the Provincial Government in this behalf and for any Presidency Magistrate to pass a sentence provided in section 2 in excess of his powers under section 32 of the said code. The question for consideration is whether, under the Code of Criminal Procedure, such magistrates have jurisdiction to try such offences in view of the fact that the sentence of imprisonment awardable extends to a period of seven years.

2. Sub-section (1) of section 29 of the Code of Criminal Procedure lays down that, subject to the other provisions of the Code, any offence under any law, other than the Indian Penal Code, shall, when any court is mentioned in this behalf in such law, be tried by such court. Sub-section (2) of the said section states that, when no court is so mentioned, it may be tried by the High Court or by any court constituted under this Code by which such offences shown in the

8th Column of the 2nd Schedule should be tried. in the 2nd Schedule offences against laws other than the Indian Penal Code are shown in the 8th Column as tribale only by the court of sessions when they are punishable with imprisonment for seven years. The short question, therefore, is whether the courts of first class magistrates specially empowered and of the Presidency Magistrates can be held to be courts mentioned in this behalf in the law relating to these offences within the meaning of section 29 as, otherwise, the cases would be triable exclusively by the court of sessions. There is no doubt from the provisions of the two Acts, the Essential Supplies (Temporary Powers)Act, 1946, and the Bombay Essential Commodities and Cattle (Control) Act, 1946, read with section 3 of the Bombay Essential Supplies (Temporary Powers) and the Essential Commodities and Cattle (Control)(Enhancement of Penalties) Act, 1947, that theintention of the legislature is that these offences should be triable by the magistrates. Section 3 of the last named Act expressly makes it lawful for these magistrates to pass sentences in excess of their powers and to the extent provided in section2. Section 14 of the Bombay Essential Commodities and Cattle (Control)Act,1943, empowers magistrates to try summarily offences punishable under that Act. A like provision is contained in section 12 of the ential Supplies (Temporary Powers)Act,1946. These visions are not repealed by the Bombay Essential plies (Temporary powers) and the Essential Commo- ies and Cattle (Control)(Enhancement of Penalties) ,1947. It can therefore, be held that the offences.....

offences in question are triable by the courts of first class magistrates and the Presidency Magistrates as courts mentioned for the purpose within the meaning of section 29 of the Code of Criminal Procedure. Unless it be so held, the provision empowering them to inflict a penalty in excess of their ordinary powers would be meaningless; such empowering pre-supposes the jurisdiction to try the case. In this connection reference may also be made to queen Empress vs. Schade (19 Allahabad 465) wherein it was held that a court of sessions was not competent to try a case in view of the fact that the relevant section of the Opium Act provided that the conviction was to be by a magistrate. In this view it would follow that the specially empowered magistates and the Presidency Magistrates would have jurisdiction to try these offences. There is no express provision, however, in any of the three enactments mentioning specifically with reference to the entry in the Second Schedule that the offences are triable by the magistrates. A doubt has, therefore, been raised as regards their jurisdiction.

3. As the question is important and is not free from doubt, the Advocate General is requested to express his opinion on the point as early as possible.

Sd/-

Remembrancer of Legal Affairs.

U.R. to Advocate General, Bombay No.11319, dated the 26th November 1947.

EKN.12/6/

No.10 of 1948.

Advocate General's Chambers,
High Court,
Bombay, 15th January 1948.

U.O.R. to the Advocate General of Bombay,
No.11319 dated the 26th of November 1947.

Opinion.

I adopt and agree with the reasoning in the statement of the case by the R.L.A. Reading the provisions of the Essential Supplies (Temporary Powers) Act, 1946, and the Bombay Essential Commodities and Cattle Control Act, 1946, with section 3 of the Bombay Act of 1947, the Legislature clearly intended that Magistates should have jurisdiction to try the offences under the two former Acts. Section 12 and section 13 of those two Acts, though directed apparently to the method of trial, show the intention plainly, and section 3 of the last mentioned Act expressly makes it lawful for Magistrates to pass sentences in excess of their powers under the Criminal Brocédure Code. Section 29 of the Criminal Procedure Code directs an offence to be tried by that Court, if any, which is "mentioned" in any law other than the Criminal Procedure Code. The Magistrates are Courts "mentioned" in the law in the said Acts, and in my opinion, the offences in question are triable by them. Having regard to the wording of section 29, I do not think it necessary for the Legislature specifically to make a reference to that section in the other law at all.

Sd/ C. K. Daphtary,
Advocate General.

EKN.12/6/

Office of the R.L.A.

Seen and returned.

The point was already noticed in Legal Department and got examined. A copy of the Statement of the Case prepared for Advocate General's opinion and a copy of Advocate General's opinion No. 10 of 1948, are appended.

Sd/ P. M. Lad.

Remembrancer of Legal Affairs.

U.R. to H.D.No. 858 dated the 26th January 1948.

EKN. 12/6/

Office of the R.L.A.

The view taken by the Police Prosecutor is correct Inspite of the fact that it gives reference to the letter written by the Secretary, H.D. to the Government of India, it would be unsafe to treat the Government of India's letter of 22nd December 1947 as a valid sanction especially in the light of the view taken by the Privy Council in Morarka's case. Since the decision of the Bombay High Court in Emperor Vs. D'Souza, it has been considered necessary to state briefly the facts constituting the offence with which the accused is to be charged. The form at slip X is a specimen sanction order under section 197 of the Criminal Procedure Code. Sanction under section 6(1) of the Prevention of Corruption Act will have to be given by a separate order in similar terms.

Sd/ P. N. Lad.

Remembrancer of Legal Affairs.

U.R. to H.D.No.1363. dated the 9th February 1948.

EXH.12/6/

Office of the R.L.A.

Sanction for prosecution.

Code of Criminal Procedure.

Section 88.

It is not clear what offence was committed by the accused. If it is alleged that he committed the offence of cheating by inducing the complainant to part with the key, that offence seems to have been committed in Bombay in which case no sanction of Government appears necessary under section 188, Criminal Procedure Code. ~~Xxx~~ P.& S.D. should ask the complainant to clarify the position before considering whether sanction of Government would be necessary.

Sd/ P.M. Lad.

Remembrancer of Legal Affairs.

U.R. to P.&S.D.,No.1417, dated the 10th February 1948.

EKN.12/6/

Office of the R.L.A.

Criminal breach of trust.

Sanction to prosecute under sec.188 Cri.P.Code.

To constitute the offence of criminal breach of trust what is necessary is the entrustment of the property. "A person cannot be said to be entrusted with property within the meaning of section 406,I.P.C., when he obtains possession by means of a trick. A trust implies confidence placed by one man in another. It xxxxxx implies necessarily that the confidence was freely given and that there is a true consent. There is no true consent if confidence is obtained as a result of a trick. If there was a trick or deceit a true consent cannot arise; there can be no entrustment and no offence under section 406 because an essential element of that offence is an entrustment." (See Ratanlal's Law of Crimes, pp.979-980). The complainant herself admits that the accused managed to take the key of his bungalow with a view to withhold her articles and to xxxxx force her to pay him more rent than was actually due; and that the accused had thus committed the offence of cheating. This shows that there was no entrustment of the property to the accused. Besides, the complainant makes it abundantly clear that this is essentially a civil dispute. On the whole, therefore it would be difficult toestablish the offence of criminal breach of trust. It would not be expedient to give sanction to criminal proceedings which are intended to bring pressure upon an adversary for the speedy settlement of a civil claim.

Sd/ P.M. Lad.

Remembrancer of Legal Affairs.

EKN. 12/6/ U.R. to P.S.D.No. 3568,dated the 13th April 1948.

Office of the R.L.A.

Criminal Procedure Code, 1898.

Sec.197

It is the status of the accused at the time of the commission of the offence and not his status at the time of the complaint or of the order issuing process whch is material for the pruposes of section 177 Cr.P.C. (see Suganchand v.Seth Narainda s A.I.R. 1932 Sind 177). This section therefore protects a person who is a public servant at the time of the alleged incident even if he ceased to be a public servant before the prosecution starts (S.Y.Patil A.I.R. 1937 Nag.293). The Allahabad High Court however has taken a different view that for the purposes of section 197 Cr.P.C. the accused must the publich servant at both these period i.e. at the time of the commission of the offence as well as at the time of prosecution (Suraj Narain Chaube v.Emp. I.L.R. 1938 All.776.) There does not appear to be any ddcision of the Bombay High Court on this point. However the view taken by the Sind Court and Nagpur High Court appears to be preferable and may be followed.

Sd/ P.M.Chad.

Remembrancer of Legal Affairs.

U.O. to H.D.(a)No.4377, dated the 6th May 1948.

EKN.12/6/

Office of the R.L.A.

Two revised draft sanction orders are forwarded.

2. On the facts as stated in the P.S.I.'s letter (page 137) it is difficult to understand why section 114 has been added. It is obviously inapplicable to the principal charge of receiving illegal gratification (section 161 I.P.C.) since the Police Patil himself received the money and retained part of it. It would seem equally inapplicable to the charge under section 409 I.P.C. since it was the P.P. who was entrusted with the property and disposed of it. Unless, therefore, section 114 is intended to apply to the abetment of similar offences committed in the same transaction by the Police Constable, it may be omitted from the sanction Order.

3. It is presumed that the Police Constable will also be put on his trial along with the Police Patil.

Sd/- P.H.Lad.

Remembrancer of Legal Affairs.

EKN.12/6/ U.R. to H.D.,No.4859,dated the 21st May 1948.

Office of the R.L.A.

I am The revised sanction orders are forwarded herewith.

The facts stated by the Sub-Inspector of Police, Anti Corruption Branch, in his special report of 19th September 1947 disclose the offence of extortion punishable under section 384 of the Indian Penal Code rather than an offence under section 261. Since, however, the making of an entry in the birth register is an official act, both the sections have been included in the sanction order under section 197 of the Criminal Procedure Code. It is presumed that the offence, was committed after the 11th March 1947, otherwise, sanction under sectio 6(b) of the Prevention of Corruption Act should be not be necessary.

Sd/ P.M. Lad.

Remembrancer of Legal Affairs.

U.R. to H.D.No.5260, dated the 3rd June 1948.

EKN.12/6/

Office of the R.L.A.

Under the first proviso to section 188 of the Code of Criminal Procedure, 1898, the certificate of the Political Agent for the territory in which the offence is alleged to have been committed is necessary before the charge can be inquired into in the Dominion of India. It is only when there is no political Agent that sanction of the Provincial Government is required. With the lapse of paramountcy on 15th August 1947 the Political Agents have ceased to function. However, their place has now been taken by the Regional Commissioners appointed by the Central Government in any acceding State or group of acceding States for representing the Central Government. The definition of "Political Agent" in clause (40) of section 3 of the General Clauses Act of 1897 has been amended by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948, Under the amended definiton, "Political Agent" means the principal officer by whatever name called, representing the Central Government in any acceding State or group of States, or any territory or place outside India. The amendment enables the Regional Commissioners to exercise and perform all statutory powers and functions which were formerly exercised and performed by the Political Agents. This seems clear from the Government of India, Ministry of Home Affairs, Letter No.8/1/48-Public, dated the 30th March 1948, to the Governor of Orissa relating to extradition proceedings between the Provinces of India and the acceding states. That letter was not before the Remembrancer of Legal Affairs when he gave his previous opinion dated 6th April 1948. the

proper.....

proper course for Government in this case would therefore be to address direct to the Regional Commissioner, Baroada, for the issue of a certificate under the first proviso to section 138. It is not legally feasible to accord sanction under that proviso.

Sd/ P.M. Lad.

Remembrancer of Legal Affairs.

U.R. to H.D., No.6128, dated the 1st July 1948. EKN22/6/

Office of the R.L.A.

It appears that in the case of Mr.Mulshanker Maganalal Vyas ex-Assistant Public Health Engineer, Government's sanction under section 197 of the Criminal Procedure Code would be required in addition to the sanction under section 196-A of the Code, for the offence under section 120-B read with section 168 of the Indian Penal Code. Such sanction was found to have been given in the case of Gill v.Emperor 49 Bom.L.R.266 in which it was held by the Federal Court following Lieut. Huntly v. King Emperor 1944 F.C.R.262 that the consent of the Governor-General under section 270(1) of the Government of India Act was not necessary for intiation of Criminal proceeding, against a public servant in respect of an offence under section 120-B read with section ~~168~~ 161 of the Indian Penal Code, as an agreement by a public servant to receive illegal gratification and the receipt of such gratification could not be said to be acts done or purporting to be done in the execution of his duty. The wording in section 197 is "offence alleged to have been committed while acting or purporting to act in the discharge of his duty". Receiving illegal gratificat or entering into a criminal conspiracy for illegally engaging in trade by a public servant is not an act done or purporting to be done in the execution of his dut But it may still be regarded as an act done while acting o purporting to act in the discharge of his official duties. Consequently sanction under sec.197 should be granted as matter of abundant caution in addition to sanction under sec.196-A, of the Criminal Procedure.

A draft sanction order is appended herewith.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

SKN.12/6/ U.R. to L.W.D. No.6133,dated the 1st July 1948.

OFFICE OF THE R.L.A.

Criminal Procedure Code section 488(3) Attachment of property for payment of alimony.

The husband was imprisoned in this case presumably because the amount of the arrears remained unpaid even after the execution of the warrant. The warrant was levying the amount in manner provided for levying fines; and, therefore, the immoveable property of the husband, joint or individual must have been exhausted and found inadequate for satisfying the demand. In these circumstances no further execution against immoveable property seems feasible for the recovery of the self-same arrears.

Sd/ P.M. Iqbal

Remembrancer of Legal Affairs.

U.R. to H.D.No.5479 dated the 1rth June 1948.

EKN.23/6/

Office of the R.L.A.

Criminal Procedure
e,1898.
tion 110.

Ill treatment of
Halpatis by Parsee
landlords.

It would be feasible to take action under section 110m Cr.P.C. against a landlord provided there is enough evidence to prove that with the help of his Sindhi watchman he is habitually intimidating, assaulting and ill-treating the Halpatis to do forced labour even when they are ill (see 31 Cal.410). Whether it is advisable to take action against all or some of these landlords is a matter of policy which Government may decide in consultation with the local officers.

Sd/- P. M. Lad.

Remembrancer of Legal Affairs.

U.R. to H.D.No. 6313

dated the 6th July 1948.

EKN.12/6/

Office of the R.L.A.

The Criminal Procedure Code, 1899.
Section 386(1).

The proviso to section 386 (1) of the Criminal Procedure Code applies in terms only to the issue of a fresh warrant and does not require the withdrawal of a warrant already issued before the expiration of the sentence in default (see Sohoni's Cr.P.C.p.740). It is not clear whether in the present case the fine was recovered in execution of a fresh warrant or of a warrant already issued before the applicant served the period of simple imprisonment in default. Inquiry should therefore be made in this respect before asking the District Magistrate to move the High Court in revisions.

Sd/ P.M. Lad.

Remembrancer of Legal Affairs.

U.R. to H.D.No. 6670 dated 16th July 1948

EKN.12/6,

Office of the R.L.A.

The Criminal Procedure Code, 1898. Section 326(1). Recovery of fine under--

The proviso to section 386(1) of the Criminal Procedure Code prohibits issue of a warrant for the recovery of fine without recording in writing the reasons in cases where the offender has under gone the whole of imprisonment in default. The remission granted by Government to the prisoner in the present case amounted to wiping out the remitted portion of the sentence including the imprisonment in default. (See Venkatesh Yeshwant v.Emp.A.I.R. 1939 Nag. 513). Consequently the prisoner would be deemed to have undergone the imprisonment in default with the result that the recovery of fine after his release would not be lawful if the warrant itself was issued after release.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

U.R. to H.D..No.8794.dated the 16th September 1948.

EKN.12/6/

Office of the R.L.A.

It is presumed that Mr.Oza has now served his sentence and is out of prison. If so, before filing a suit against him the Collector may be instructed to give him a notice calling upon him to pay up the balance failing which Government would be compelled to file a suit against him. After issue of such notice and receipt of reply if any from Mr.Oza the papers may be sent back to the Legal Department for further action.

Sd/- P. M . Lad.

Remembrancer of Legal Affairs.

U.R. to M.R. D.D.,No.6026, dated the 28th June 1948.

EXN.12/6/

Office of the R.L.A.

Whether Civil liability is extinguished by undergoing imprisonment for the crime connected with the same matter.

Criminal Procedure Code, 1898, Sections 545 and 546.

Under section 545 of the Criminal Procedure Code, a Criminal Court while imposing a fine can order that the whole or any part of the fine recovered be applied in the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court. Section 546 further provides that at the time of awarding compensation in any subsequent Civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under section 545. These provisions clearly contemplate that after the criminal action action is over, a civil suit in respect of the same matter can be filed. The Sessions Court had ordered Mr. Usa to pay a fine of Rs.1000/- but no order was made in respect of this fine under section 545. Secondly this part of the sentence was reversed by the High Court. The substantive sentence of imprisonment was imposed for the crime and not in lieu of the compensation payable to Government for the loss. In these circumstances the amount of the loss can be legally recovered from Mr. Usa and his sureties. The sureties having made the payment, Mr. Usa will be liable for the balance.

Before taking final action, the Department may give due consideration to Mr. Usa's complaint about non-recovery from Messrs. Ghanekar and Nowgaonkar.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

U.R. to A.R.D.D No.9364, dated the 4th October 1948.

EKN.12/6/

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...R.D.D No.9586, date...

Office of the R.L.A

By H.D. notification No.3171/5, dated November 1947, Mr.Dhamdhere was empowered to pass sentences provided in section 2 of the Bombay Essential Supplies (Temporary Powers) And Essential Commodities and Cattle (Control) (Enhancement of Penalties) Ordinance, 1947 in excess of his powers under section 32 of the Code of Criminal Procedure, 1898- By G.R.,H.D.,No.4529/5. dated the 22nd April 1948 a temporary post of special Magistrate at Ahmedabad was created to try the textile cases, the duration of the post being for a period of six months or until the cases are disposed of, whichever is earlier. By P.& S.D. notification No. 41/9-II dated 19th May 1948, Mr.Dhamdhere was appointed to hold the temporary post of special Magistrate, Ahmedaba, created by G.R.,H.D.No.4529/5, dated 22nd April 1948. The District Magistrate, Ahmedabad, states that Mr. Dhamdhere was recently transferred as Deputy Collector, Riot Tax, on 21st August 1948 and Mr.Dave is appointed as his successor. It is clear from the notification referred to above that Mr.Dhamdhere was appointed as a special Magistrate and it is while working as such Magistrate that he exercised the powers of awarding enhanced punishments. Since Mr.Dave is now appointed as a Special Magistrate in the post created By.G.R.H.D No.4529/5, dated 22nd April 1948 it will not be possible for Mr. Dhamdhere to try the cases and exercise the special powers, for the ceased to be a Special Magistrate as soon has he was transferred as Deputy Collector, Riot Tax. Where an officer is permanently appointeed to other duties, in an office which is not an equal orhigher office of the same nature, and whidh do not involve magisterial work and is thus dissociated from magisterial work, he would not be

able... ...

able to exercise the magisterial powers even in the same local area. Moreover, in this case, the magisterial powers were attached to a particular post which is now held by another incumbent. In these circumstances, the proposal made by the Collector and endorsed by the Commissioner is necessary and should be accepted.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

U.O. to H.D.No.9723 dated the 18th October 1948.

EKN.12/6/

Office of the R.L.A.

Cancellation of detention orders when detenu is sentenced to imprisonment
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Bombay Public Security Measures Act, 1947 and the Code of Criminal Procedure 1898.
S.c.383.

The course proposed by the District Magistrate does not appear to be legally feasible Under section 383 of the Code of Criminal Procedure where an accused is contenced to transporatation orirprisonment in cases other than those provided for by section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is, or is to beconfined, and, unless the accused is already confined in such jail, shall forward him to such jail with the warrant. Theprovisions of this section are imperative and the sentence of imprisonment ought to commence from the time the sentence is passed. A Magistrate has no power to postpone the execution of the sentence at the request of the accused (Kishen Soondar, 12 W.R.47). It is presumed that the Resident Magistrate, Karwar who sentenced the accuse to imprisonment in the present case has forwarded the warrants to the jail in which they are or are to be confined. It is these warrants have got to be exouted unless the exeuction thereof is to be suspended under section 426. Even the trial Resident Magistrate, much less the District Magistrate, Karwar, has no power to postpone the execution of sentence in order to enable the prisoners to be under detention at Karwar till their appeal is decided, for that would be tantamount to ordering that the sentence should commence after the detention under district Magistrate's orders is over which is objectionable (see 5 Rang 93 and Public Prosecutor, Madras A.I. R 1938 Mad.612, quoted at page 1256 of Mitra's Criminal Procedure Code).

EKN.12/6/

Attention.....

Attention is invited to H.L.A's No.10612 dated 6th November 1947 and No.389 Confl. dated 21st July 1948. Although it may ordinarily be deisrable to cancel the detention orders such cancellation need not be made until the appeal tax is decided. In the meantime, by reason of the delegation contained in Government Notification, Home Department (Pol)No.S.D.671-C, dated the 1st May 1940 it would be competent to the District Magistrate to direct that the detention should be undergone at the Belgaum Central Prison where the sentence would also be undergone.

Sd/ P.M. Lad.

Remembrancer of Legal Affairs.

U.R. to H,D.(Spl)No.8585, dated the

10th September 1948.

EKN.12/8/

Office of the R.L.A.

The view taken by Secy.M.P. is correct. What the accused Godse has stated in reply to the questionsput by the Court under section 342, Cr.P.C. is a statement within the meaning of the order No.S 163 (Poll). dated 11th November 1948.

Sd/ P.M. Lad.

Remembrancer of Legal Affairs.

U.R. to H.D.(Poll) No.11770, dated the 11th Dec. 1948.

E.N.12/6/

Office of the R.L.A.

Against Mr.S.M.Pandya, Superintendent of Police, Lunawada, it is alleged :

(i) that he fired a ~~mmk~~ revolver shot and injured Bhura Bhathi in the thigh after he was arrested and handcuffed;

(ii) that he lodged a false complaint against Bhura Bhathi for the alleged offence of the attempt to commit murder of Police Constable, Abdullah Rasul Khan, and

(iii) that he fabricated false evidence by recording false statements of witnesses and causing Abdullah to pretend that he had received serious injuries from Bhura Bhathi.

2. The District Magistrate of Panch Mahals and States reports that the above acts of Mr.Pandya amount to offences punishable under section 324 or 326 I.P.C., second part of 211 I.P.C., and 198 I.P.C respectively, and is of opinion that Mr. Pandya should be prosecuted for these offences. The Government Pleader, Panch Mahals, has opined that none of the acts of Mr. Pandya can be said to be acts done or purporting to be done by him in the discharge of his official duty and that, in view of the Privy Council decision in Gill vs.King, 50 Bombay Law Reporter; page 487, no sanction is necessary for prosecuting him for the said offences. The R.L.A. is requested to advise whether sanction is legally necessary for instituting a prosecution against Mr.Pandya for the above-mentioned offences.

3. In Gill vs. the King, 75 Indian Appeals; page 41 the test was formulated by Their Lordships of the Privy Council at pages 59-60 as follows:-

"A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty---The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office." It may be that the claim may not eventually be substantiated. That is a question of the merits of the case. At this stage we have to enquire whether the prosecution as disclosed in the Police Report does not involve the consideration whether the act purported to be done in executionof duty (see Hari Ram Singh vs. the Crown, 1939, Federal Court Report, page 179 and the Sarjoo Prasad vs. the King Emperor, 1945, Federal Law Journal Reports; page 239 at page 240).

4. On the charges under section 324 or 326 the principle matter in issue in this case would be whether the Superintendent of Police acted in discharge of his duty in overcoming the resistence by reasonable force of a person who was trying to escape arrest. The prosecution case, as presented, immediately involves the consideration of this issue. Speaking of a similar hypothetical case with reference to section 80 of the Bombay District Police Act which used the words" acts done in good faith thepursuance or intended pursuance of any duty and acts done under colour or in edcess of any such duty", Madgavkar J. said in the case of Narayan vs. Yeshwant, 30 Bombay Law Reporter; page 1018 at page 1044 that 'n a case where a person is being arrested or while under arrest is being taken to the lock-up and offers resistence, such acts of battery and assault , even if they are in excess of the force necessary to prevent escape, would probably require notice under sub-section 3 of section 80, There was no such allegation in that case; but since the allegation is made here and the question whether

the act purported to be done in the discharge of duty is thus involved, the safer view to take would be that sanction is necessary.

5. As regards the other two offences viz. of making a false complaint and fabricating evidence, they are directly relatable to the duty of a Police Officer, although in the discharge of his duty he may have committed a wrong. Narayan's case cited above is direct authority for that proposition; for in that case it was held that where the record of the statements was deliberately made inaccurate by a Police Officer, the act must be said to be done under colour of his duty which is the same as saying that it purported to be done in the discharge of his duty. (See also R.L.A's opinion No.9067, dated 15th October 1948, where it was held that the submission of a report embodying a false charge by a Police Patel purported to be done in the discharge of his duty). The nature of the act attached it to the official character of the person doing it which was the criterion adopted by Varadachariar J. in Hori Ram Singh's case and generally approved by the Privy Council in Gill's case.

6. On the whole, therefore, I am of opinion that this is a case where the Police Superintendent can reasonably claim that what he did he did in virtue of his office. For that reason, I would advise that sanction should be given.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

U.R. to H.D.No.653-Confl dated 30th November 1948.

EKN.13/6/

Office of the R.L.A.

The view taken by the District Magistrate is correct. The R.L.A. proceeded on his impression formed when the question of delegation was discussed that thexpowers to detain outside the district were to be given to District Magistrates in view of the releases ordered by the High Court. However his point does not arise since the District Magistrate, Kanara has alcelled the detention orders in the present case.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

U.R. to H.D.(Spl).No.577-Confl dated the 28th October 1948.

EKN.13/6/

Office of the R.L.A.

Sanction to prosecute Mr.Kavi.

Criminal Procedure Code, 898.Sec.197.

Section 197, Criminal Procedure Code, enacts rotection to a public servant in respect of offences lleged to have been committed while acting or urporting to act in the discharge of his official luty. The act of misappro-priation and the consequent breach of trust punishable under section 409, Indian Penal Code, can hardly be claimed to have been so committed and it is now well settled th t no sanction is necessary for prosecution for such offence. No sanction is therefore necessary. The view taken by the Chief Secretary is correct.

SM/ P.M.Lad.

Remembrancer of Legal Affairs

U.R. to P.& S.D.No.11894, dated the 15th December 1948.

EKN.13/6/